80-1392

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ALEXANDER L. STEVAS,
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL K. JOHNSON,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

I. Whether a warrantless search of an unoccupied, immobile automobile parked in the driveway of a defendant's home is unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution.

A. Whether the police officer who conducted the search had probable cause to believe that the automobile contained evidence pertaining to the identity of the defendant and to locations where he may have fled.

B. Whether there were exigent circumstances to justify the search where the police had taken control of the area surrounding the automobile and blocked it from the street.

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DANIEL K. JOHNSON,
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v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner prays for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals was not reported (App. A, *infra*, pp. A-1 to A-7). The dissenting opinion to the denial of petitioner's motion for rehearing in the Texas Court of Criminal Appeals also was not reported (App. B, *infra*, p. B-1).

JURISDICTION

The judgment of the Texas Court of Criminals Appeals was entered on May 21, 1980. A timely motion for re-

hearing was denied without written opinion on December 17, 1980 (App. C, *infra*, p. C-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV, which provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

U.S. CONST. amend. XIV, which provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Petitioner was tried for the offense of aggravated rape. The complainant, a married airline stewardess, testified that she first met petitioner at the cosmetic counter in a department store (R. 126). They conversed concerning his business, and petitioner asked her to meet him that afternoon for an interview if she was interested in a job (R. 127-28). He gave her written directions to his office (R. 130-31). Later that afternoon, she went to that location and ultimately accompanied petitioner to a vacant house across the street (R. 134, 139-40). Once inside the house, petitioner exhibited a knife and forced her to have sexual intercourse (R. 151-61). She did not sustain any physical injuries. Several days later, her husband reported the alleged rape to the police (R. 175).

Petitioner testified that the complainant accompanied him willingly to the house, expressed dissatisfaction with her marriage, and engaged in consensual sexual intercourse (R. 395-98). Petitioner denied that a knife was exhibited or used to force the intercourse. They had an argument wherein the complainant accused him of falsely promising her a job to engage her in sexual intercourse (R. 399-400). They cursed each other and parted company.

The primary issue at trial was whether or not the sexual intercourse was consensual. The jury was presented with a difficult credibility choice between the complainant and petitioner. The only physical evidence that tended to corroborate the complainant's version of the facts was the finding of a knife during a search of petitioner's car one week after the alleged offense. Its admission at trial over timely objection forms the basis of the present petition.

D. B. Sheetz, a Houston police officer, testified that on the afternoon of April 21, 1977, Detective White and he drove in a marked police car to petitioner's home with a warrant for his arrest for aggravated rape (R. 99). While en route, they saw petitioner driving his car, and followed him home. Petitioner drove into the driveway of his home. Sheetz pulled the police car behind petitioner's car, thereby blocking his egress from the driveway.

They exited their respective vehicles and met in the front yard (R. 101). The officers said that they had a warrant for petitioner's arrest. Detective White held the warrant in a position to enable petitioner to read it. Petitioner denied that he was Daniel Johnson and said that his name was McGee (R. 102). The officers asked for identification. Petitioner said that his driver's license

was inside the house. He entered the house and slammed the front door.

The officers followed petitioner inside, saw him go out the back of the house and climb over the back fence (R. 102-03). A lady and small child were present in the house. The officers asked her who the man was, and she said that he was her husband, Daniel Johnson. Sheetz then unsuccessfully pursued petitioner.

Several minutes after petitioner fled, and after his wife confirmed his identity, Sheetz returned to petitioner's car and looked inside (R. 104). His stated purpose was to search for information concerning "identification . . . , relatives or friends or anybody he may have possibly gone to visit. . . ." Sheetz did not have a warrant to search the car. The car was parked on petitioner's private driveway, was blocked from the street by the police car, was unoccupied and immobile (R. 111). Numerous police officers had arrived to provide assistance in locating petitioner. Neither petitioner, his wife, nor any other person attempted to gain access to the car (R. 103-104).

Sheetz observed a billfold on the driver's side of the front seat. He opened the car door to pick it up and saw a small paring knife on the floorboard on the passenger side (R. 105). He could not see the knife until he opened the door and actually entered the car (R. 111). He placed the knife in the center console (R. 105), and left it there so it could be properly tagged at the police station (R. 115). He subsequently had the car towed to the police station so the police could "search for other clues" to connect petitioner to the offense (R. 107-08).

The officers admitted that they had not attempted to get a search warrant for the car when they got the arrest

warrant, because they did not have sufficient information to establish probable cause (R. 114). Althought Sheetz knew that a knife had allegedly been involved in the offense (R. 106), he denied that he searched the car for a weapon, indicating that he thought that petitioner probably still had the knife on his person (R. 110-11). Sheetz admitted that after petitioner fled, the officers had time to get a warrant before searching the car (R. 110), especially in light of the fact that they stayed at petitioner's home until about 10:00 p.m. to see if he would return (R. 104). During this period of time, the officers had control of the area surrounding the car. No one else had access, or attempted to gain access, to the car.

The knife was actually seized in a warrantless search of the car at the police station. It was admitted over objection at trial. The prosecutor emphasized the importance of the knife during his final argument. He stressed that the complainant had told the police that petitioner had a paring knife when he raped her. She had never been in his car, yet the police found a paring knife in the car when they went to arrest petitioner (R. 469). The prosecutor concluded that her testimony was truthful because it was corroborated by the finding of the knife (R. 473).

Petitioner raised the federal question on appeal, contending that the knife was obtained as a result of an unreasonable search and seizure, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The Texas Court of Criminal Appeals, by a divided vote, upheld the search and affirmed the conviction and life sentence.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING THE APPLICATION OF THE FOURTH AMENDMENT TO A WARRANTLESS SEARCH OF AN UNOCCUPIED, IMMOBILE AUTOMOBILE PARKED IN THE DRIVEWAY OF A DEFENDANT'S HOME.

To justify the warrantless search of a car, the State must show the existence of probable cause at the time the search was made and exigent circumstances which made the procuring of a warrant impracticable. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). In *Coolidge,* police officers arrested the defendant inside his home and took him to jail. At that time, the defendant's car was parked in the driveway of his home. His wife requested, but was denied permission to take the car. Officers had the car towed to the police station where it was searched and evidence seized. This Court held that there were no exigent circumstances to justify the search of the car without a valid warrant.

The Court distinguished the search of a parked car on private property from the search of a car stopped on a public highway. In *Chambers v. Maroney,* 399 U.S. 42 (1970), the Court held that when there was probable cause to search an automobile stopped on the highway, the exigencies of the situation did not require a warrant. The Court observed that the car was moveable, the occupants alerted, and the car's contents might never be found again if a warrant must be obtained. 399 U.S. at 51. The Court concluded:

> For constitutional purposes, we see no difference between . . . seizing and holding a car before presenting the probable cause issue to a magistrate and . . . carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> 399 U.S. at 52.

In *Coolidge,* this Court clarified the applicability of *Chambers*:

> The rationale of Chambers is that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of whether the initial intrusion is justified. For this purpose, it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose. That the police may have been legally on the property in order to arrest Coolidge is, of course, immaterial, since . . . that purpose could not authorize search of the car. . . .
>
> 403 U.S. at 463, n. 20.

Since *Coolidge* and *Chambers* were decided, the focus of inquiry as to the reasonableness of a warrantless search or seizure of a car has moved away from the custodial status of its owner or operator and more to the mobility potential of the car itself. There are readily apparent differences in the exigencies involved between the search of a "moving" vehicle stopped on the highway and search of an unoccupied, immobile vehicle located on private property. See *Cardwell v. Lewis,* 417 U.S. 583, 594-95

(1973). Because the Texas Court of Criminal Appeals did not accord sufficient respect to this distinction, the grant of certiorari is appropriate to resolve the conflict with applicable decisions of this Court.

A. There Was No Probable Cause To Search The Automobile

The Texas Court of Criminal Appeals held that the officer had probable cause to search petitioner's car for evidence to confirm his identity as being the person who had fled, and to obtain evidence as to where he might have fled. The validity of this holding rests upon two dubious propositions. The first is that the officers did not already know who petitioner was, and needed to invade a constitutionally protected area to obtain additional evidence of identity. The second is that the officers could reasonably expect to find evidence in his car concerning where he might have fled. Neither proposition can withstand close scrutiny.

There was no independent probable cause to search the car for evidence of the offense for which the officers had an arrest warrant. The complainant had never seen petitioner's car, it was not used in the alleged offense, and there was no reason to believe that it contained evidence connected to the offense. Officer Sheetz admitted that they did not attempt to get a search warrant for the car at the same time that they got the arrest warrant, because, "We had information as to what he might be driving but we didn't have any better information to establish probable cause for a search warrant" (R. 114). Officer Sheetz negated a contention that he had probable cause to search the car for evidence after petitioner fled.

He denied that he searched the car for a weapon, as he believed that petitioner still had the knife on his person (R. 110-11).

Thus, the issue is whether the officer's stated purpose for the search (to look inside the car for information concerning "identification . . ., relatives or friends or anybody he may have possibly gone to visit. . . .") rose to the level of probable cause. Petitioner submits that it did not. There were reasonable alternatives available to confirm identity, if truly in issue, without intruding into a constitutionally protected area. In addition, an officer could not reasonably expect to discover in a car information concerning where a person might have gone.

Prior decisions of this Court do not support the entry of an unoccupied, immobile car that is parked in the driveway of a person's home to conduct a warrantless "search for identification." In *Mincey v. Arizona*, 437 U.S. 385 (1978), this Court rejected a purported "murder scene" exception to the warrant requirement, holding that if a warrantless search of a homicide scene was reasonable, so would be a warrantless search of any other crime scene. There was no way to suggest any point of rational limitation of such a doctrine.

The rationale of *Mincey* calls for rejection of the "search for identification" doctrine. If an officer can enter a car to search for identification of the driver, presumably he could also open the glove compartment, trunk, or any suitcases, briefcases or containers located therein. Following the same rationale, he could search the person's home, closet, and personal effects in an effort to "verify identification." This Court has implicitly rejected such a proposition. *Arkansas v. Sanders*, 444 U.S. 753 (1979).

The "search for identification" doctrine advanced by the court below improperly authorizes unlimited intrusions and general searches of constitutionally protected areas in contravention of the Fourth and Fourteenth Amendments to the United States Constitution.

The "search for identification" doctrine was rejected in *United States v. Thompson*, 597 F.2d 187 (9th Cir. 1979). The government argued that examination of the contents of an envelope that officers took from the defendant-driver was reasonable as a brief "identity search." The Ninth Circuit found the search unreasonable where the officers could have verified identity by checking the car with the state motor vehicle department, and where they only had a hunch that the contents of the envelope would help prove or disprove the identity of the driver.

Petitioner submits that identity was not truly in issue in the instant case. Petitioner matched the physical description given to the police by the complainant. Charles Ellis, a witness who knew petitioner, had also given the police an identical description. The officers had followed petitioner home, believing at the time that he was the same person named in the arrest warrant. They went to the address given in the warrant as his home. Petitioner fled upon seeing his name on the arrest warrant. Finally, petitioner's wife had confirmed his identity to the officers prior to the search of the car.

Moreover, the officers could easily have confirmed identity without entering the car. They could have simply checked the vehicle identification number or the license number. It is well established that a license plate is affixed to a car for the very purpose of allowing identifi-

cation by law enforcement agencies and others. *United States v. Humphries,* 600 F.2d 1238, 1245 (9th Cir. 1979). In *State v. Pace,* 171 N.J. Super. 240, 408 A.2d 808 (1979), the State argued that an officer had the right to search a car to determine ownership of the driver after he could not produce a driver's license, car registration or personal identification. In rejecting this contention, the court "seriously questioned" the motives of the officer since information concerning ownership could have easily been obtained from computer records. 408 A.2d at 813.

Assuming that the officers did not already have sufficient evidence of petitioner's identity to confirm that the person named in the warrant was the same person who had fled from them, they could have asked his wife for a picture of him. Also, had they really only wanted to ascertain identity, there was no reason to have the car towed to the police station for a thorough search. Their conduct in seizing the car and having it transported to the police station for a search by personnel of the crime scene laboratory (during which search the knife was seized), belies the testimony that Officer Sheetz was interested only in confirming the identity of the driver.

Furthermore, the officers had no reason to believe that a person would have information in his car concerning places that he would be likely to go. Once inside the car, Officer Sheetz made no effort to search for information concerning where petitioner might have fled. Although he testified that this was a reason for entering the car, his actual conduct belies his testimony.

On this record, identity was not truly in issue. Even if it was, the warrantless "search for identification" was an unwarranted intrusion into a constitutionally protected

area that could have been avoided by other reasonable alternatives. The dissenting opinion in the Texas Court of Criminal Appeals accurately analyzed the problem:

> The fallacy in the opinion on original submission is in justifying a search of an unoccupied automobile in a private driveway on the notion that the officers, armed with an arrest warrant, needed to identify positively the citizen who had normally walked away from the car toward his residence but then fled out the back "as the person [named] on the arrest warrant," so it was reasonable for them to look in the automobile for some identification and also for "some information as to where . . . [the citizen] . . . might flee." That is pure surmise, not probable cause.

B. There Were No Exigent Circumstances For the Warrantless Search Of The Car..

Assuming *arguendo* the existence of probable cause, petitioner submits that there were no exigent circumstances to justify the warrantless search of the car. The Texas Court of Criminal Appeals concluded that exigent circumstances were presented by the need of the officers to positively identify petitioner and to determine as quickly as possible where he might have fled. That court reasoned that petitioner or one of his friends or relatives might attempt to move the car. A proper application of the law concerning exigent circumstances for a warrantless search demonstrates that the court below erroneously interpreted *Coolidge* and its progeny.

Petitioner's car was unoccupied, immobile and parked in the driveway of his home. It was blocked from the street by a police car parked directly behind it. Its loca-

tion and control were subject to the will of the police. Numerous officers were at petitioner's home within minutes after he had fled. They remained there from the time of the initial confrontation, late in the afternoon, until about 10:00 p.m. As in *Mincey v. Arizona, supra,* there was a police guard on the premises to prevent petitioner, his wife, or any other person from obtaining access to the inside of the car to move it or to destroy evidence (R. 103-04). Officer Sheetz admitted that they had time to get a warrant before searching the car (R. 110).

Under these circumstances, there was no real threat that the car could be moved or its contents removed. No person attempted to gain access to the car during the five hours that it remained in the driveway. It defies reality to assume that petitioner or some member of his family would have tried to do so in the presence of numerous police officers. Had this occurred, the officers could have prevented that person from moving the car or removing its contents pending the determination of a request for a search warrant. Ample time existed during this five hour period to obtain a warrant if the officers could have demonstrated probable cause to a magistrate. The second search of the car at the police station was without a warrant and was for the sole purpose of obtaining evidence. This belies the contention of the officers that they were merely "searching for identification."

Courts have emphasized that there are no exigent circumstances to justify the warrantless search and seizure of a car parked in the driveway of a defendant's home where the car could not have been driven away because a police car was blocking the driveway. In this situation,

the car "more resemble[s] a house than a moving or mobile vehicle." *United States v. McCormick*, 502 F.2d 281, 287 (9th Cir. 1974). See also *United States v. Kelly*, 547 F.2d 82 (8th Cir. 1977); *State v. Sauve*, 112 Ariz. 576, 544 P.2d 1091 (1976). Thus, the premise relied upon by the court below to justify the search (that the car might soon be driven from the area) is not supported by the case law or the evidence. This car, like the footlocker in *United States v. Chadwick*, 433 U.S. 1 (1976), was in the exclusive control of the officers. There were no exigent circumstances to justify the warrantless search.

The conduct of Officer Sheetz belies his testimony that he was searching to determine where petitioner might have fled. He testified that he simply removed a driver's license from the billfold and then gave the billfold to petitioner's wife (R. 107). He directed that the car be towed to the police station to "go over it a little better to search for other clues to connect [petitioner] to the crime" (R. 108). It is clear that the officer did not pursue his stated intention, as he did not search the car for evidence to determine where petitioner might have fled.

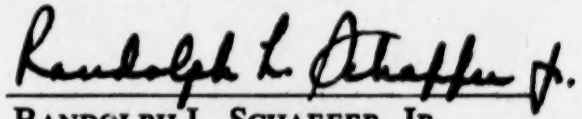
This record reflects that the officers knew the identity of the person who had fled, confirmed their knowledge through his wife, and could have confirmed it further by checking the license plate number or the vehicle identification number. These were reasonable alternatives to a "search for identification." No person attempted to gain access to the car during the entire five hours that it remained in the driveway of petitioner's home. This search was not conducted under exigent circumstances.

The inherent danger in the holding of the court below is in permitting police to conduct a warrantless search of a wanted suspect's car (and by implication, his home) to determine where he might have gone, if he has to that point evaded arrest. This holding does not accord sufficient respect to the safeguards of the Fourth Amendment. The issue will no doubt occur with frequency throughout the various federal and state courts. This Court should grant certiorari to resolve the conflict.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,



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February 16, 1981

APPENDICES

Appendix A	Opinion of the Texas Court of Criminal Appeals
Appendix B	Dissenting Opinion Overruling Petitioner's Motion For Rehearing
Appendix C	Order Denying Motion For Rehearing

APPENDIX A

NO. 59-436

DANIEL K. JOHNSON,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from HARRIS County

OPINION

This is an appeal from a conviction for the offense of aggravated rape. The punishment is imprisonment for life.

The appellant asserts: the indictment was faulty; evidence was improperly admitted; the State's attorney exceeded the bounds of proper jury argument; evidence which was admitted was obtained by an unlawful search and seizure; the trial court erred in allowing five witnesses to testify about appellant's reputation.

The appellant contends that the indictment was faulty in two respects. The first is that the indictment alleged "force" and not "force that overcomes such earnest resistance as might be expected under the circumstances" and alleged "threats" and not threats "that would prevent resistance by a woman of ordinary resolution." The indictment alleged that the appellant

> "unlawfully, intentionally and knowingly by force and by threatening the imminent infliction of serious bodily injury and death to L—— D. C———, a

> female not his wife and hereafter styled the complainant, have sexual intercourse with the complainant and without the consent of the complainant."

This Court in Watson v. State, 548 S.W.2d 676 (Tex. Cr. App. 1977) upheld exactly the same language of an indictment. The defendant in that case made the same contention that is made here and it was overruled.

The appellant next argues that the indictment failed to allege that appellant compelled submission to the rape by force and threats. In Church v. State, 552 S.W.2d 138 (Tex. Cr. App. 1977) this Court upheld the same language when it was attacked on the same grounds as alleged here. For the reasons stated there, we hold that the indictment is sufficient.

The appellant's next ground of error is that the trial court erred in allowing a witness to testify that the complainant "had a look of terror in her eyes" at a social gathering several days after the rape. The appellant contends that this was improper conclusion and opinion. We disagree. In Hays v. State, 480 S.W.2d 635 (Tex. Cr. App. 1972) we held testimony that a victim "appeared angry" was a proper shorthand rendition of facts. This Court in Ashley v. State, 527 S.W.2d 302 (Tex. Cr. App. 1975) held that the question, "What was her mental state at that time from your point of view, your observation point" to be proper. The Court added, "We have always permitted lay opinions as to the attitudes or emotional state of the accused as well as others. . . . Although . . . such evidence is seldom direct evidence of the commission of a crime, it is consistently indicative of the demeanor of the persons involved, and invaluable aid in understanding the circumstances of the event." In the present situa-

tion the witness' statement that the complainant had a "look of terror in her eyes" was no more than a description of the complainant's outward appearance and mental state. We find no error.

The appellant next asserts that the prosecutor's final argument at the guilt-innocence stage was improper. The prosecutor stated: "If she [complainant] had a sexual encounter and gave her consent why say anything at all because you wouldn't be sitting up here five days and you wouldn't have to have defense lawyers saying things about you."

For reversible error the jury argument must be manifestly improper, or inject new and harmful facts. Thomas v. State, 519 S.W.2d 430 (Tex. Cr. App. 1975); Minter v. State, 505 S.W.2d 581 (Tex. Cr. App. 1974). For the jury argument to be proper it must stay within the record or be in reply to defense counsel's argument. Cook v. State, 537 S.W.2d 258 (Tex. Cr. App. 1976); Hughes v. State, 563 S.W.2d 581 (Tex. Cr. App. 1978). In the instant case the following testimony occurred when defense counsel was cross-examining complainant:

"Q. Why didn't you [report the rape immediately]?
"A. I didn't think anything would be done. I didn't want to be tore up and made to look like a whore in the courtroom.

* * * *

"Q. And you are saying the reason for that [not reporting the rape immediately] is you didn't want some lawyer to come in here and make it look like a slut.
"A. Yes, sir."

In the appellant's final argument his defense attorney argued that, "She doesn't want to report this to the police because some slick lawyer would make her look like a whore or slut." Thus the prosecutor's remarks were in response to the defense counsel comments and were within the record. Alejandro v. State, 493 S.W.2d 230 (Tex. Cr. App. 1973). There was no extreme or manifestly improper argument and no reversible error.

The appellant further contends that during the punishment stage it was error for the prosecutor to state: "I am glad she is not dead. I wonder if she might have thought she wished he had taken her life so she wouldn't have to go through this." The trial court sustained appellant's objection and the jury was instructed to disregard the remarks. We hold that the trial court's action and instructions to the jury to disregard the comment adequately protected the interest of the appellant. Rodriquez v. State, 552 S.W.2d 451 (Tex. Cr. App. 1977); Young v. State, 547 S.W.2d 23 (Tex. Cr. App. 1977).

The appellant also contends that it was reversible error to admit in evidence a knife which he alleges was obtained as the result of an unreasonable search and seizure. In the case at bar two officers in a blue and white police car saw appellant driving a brown station wagon. The officers had an arrest warrant for Daniel Johnson. They did not know what Daniel Johnson looked like but they did have a general description of the car he would be driving. The police followed the appellant to his home where he parked his automobile in the driveway. The officers parked behind appellant's automobile. As appellant stepped from his car and walked toward his home, the officers called to him and approached. They stated

they had an arrest warrant for Daniel Johnson. The appellant told the officers he was Daniel McGee. When asked for some identification the appellant stated that his driver's license was inside the house. The appellant went inside the house, slammed the door, ran out the back door and jumped over a fence. The officers were unable to catch him. They returned to the house and asked a woman inside who that man was. She said it was her husband, Daniel Johnson. The police returned to their car and requested assistance. Numerous police cars and a helicopter responded to help in the search. The officers then went to the appellant's car. Approximately two minutes had elapsed from the time the appellant had gone inside the house. The police noticed a wallet on the driver's side of the front seat. The car was unlocked and as one officer reached in to get the wallet he noticed a knife on the floor of the car. The knife was later seized and admitted in evidence.

Appellant contends that this was an unlawful search and seizure. We disagree.

The officers had probable cause to search. Probable cause for a search exists where the facts and circumstances known to the officers upon reasonably trustworthy information would lead a man of reasonable caution and prudence to believe that the search will produce evidence to a crime. Smith v. State, 542 S.W.2d 420 (Tex. Cr. App. 1976). In the case at bar the officers had an arrest warrant for an individual who had just evaded arrest. The officers needed to positively identify the person they had seen as the person on the arrest warrant. Further, they had no picture of the person to help facilitate his capture. It was reasonable for the officers to believe that

a driver's license usually carried in a wallet would provide that information. The officers were also reasonable in believing that some information as to where the appellant might flee would be found inside the automobile. The two officers were also aware that a brown station wagon had been involved in other rape offenses. In light of all the information available to the officers, they had probable cause to search the automobile.

However, even though probable cause exists, before a warrantless search can be deemed reasonable the search must be within one of the exceptions to the warrant required. Kolb v. State, 532 S.W.2d 87 (Tex. Cr. App. 1976). In the instant case there were exigent circumstances justifying the search. The appellant had evaded arrest. The police need to positively identify the appellant and as quickly as possible ascertain where he might flee. To delay for a warrant would have unreasonably jeopardized the capture of the appellant. In addition the appellant or one of his friends or relatives might attempt to move the automobile. Therefore, we conclude that the search was conducted with probable cause under exigent circumstances. Buitron v. State, 519 S.W.2d 467 (Tex. Cr. App. 1975) cert. denied 423 U.S. 837, 96 S.Ct. 64, 47 L.Ed.2d 56 (1976); Smith v. State, 504 S.W.2d 875 (Tex. Cr. App. 1974). Appellant's ground of error is overruled.

Appellant's final contention is that error was committed when the trial court allowed five reputation witnesses to testify at the punishment stage of the trial. Appellant argues that the witnesses were not qualified. A witness' opinion as to reputation may not be based solely on the offense for which the appeliant is on trial. Woodkins v.

State, 542 S.W.2d 855 (Tex. Cr. App. 1976); Witt v. State, 475 S.W.2d 259 (Tex. Cr. App. 1971). Nor may it be based solely on the witness' personal knowledge or opinion of the appellant. Beecham v. State, 580 S.W.2d 588 (Tex. Cr. App. 1979). The witness must have discussed with other members of the accused's community or the witness must have heard discussed the accused's reputation for being peaceful and law-abiding. Mitchell v. State, 524 S.W.2d 510 (Tex. Cr. App. 1975).

In the case at bar, each of the five reputation witnesses had allegedly been raped by the appellant. This was shown on voir dire out of the presence of the jury. They each testified that they had talked to one another and with police officers about the appellant's reputation. Furthermore, they all testified that the discussions with one another and the officers had a bearing upon the opinion they formed concerning appellant's reputation.

The judgment is affirmed.

PER CURIAM

(Delivered May 21, 1980)

By: Panel No. 3; Fourth Quarter, 1979
Truman Roberts, Judge
W. T. Phillips, Judge
Carl E. F. Dally, Judge

Roberts, J., not participating

APPENDIX B

NO. 59,436

DANIEL K. JOHNSON, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from HARRIS County

DISSENTING OPINION TO OVERRULING APPELLANT'S MOTION FOR REHEARING WITHOUT WRITTEN OPINION

The fallacy in the opinion on original submission is in justifying a search of an unoccupied automobile in a private driveway on the notion that the officers, armed with an arrest warrant, needed to identify positively the citizen who had normally walked away from the car toward his residence but then fled out the back "as the person [named] on the arrest warrant,"[1] so it was reasonable for them to look in the automobile for some identification and also for "some information as to where . . . [the citizen] . . . might flee." That is pure surmise, not probable cause.

I respectfully dissent.

CLINTON, Judge

(Delivered December 17, 1980)

EN BANC

Phillips, J. joins

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1. They had already been told by his wife that he was her husband whose name she gave was the same name on the arrest warrant.

APPENDIX C

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas do hereby certify that in Cause No. 59,436 styled:

DANIEL K. JOHNSON, Appellant

vs.

STATE OF TEXAS, Appellee

the judgment of the 230th. Judicial District Court of Harris County, Texas was Affirmed on May 21, 1980, on December 17, 1980 the Appellant's Motion for Rehearing was Denied Without Written Opinion and on December 19, 1980 the mandate of this Court issued.

THEREFORE, WITH THE DENYING OF THE APPELLANT'S MOTION FOR REHEARING, this cause was disposed of by this Court on December 19, 1980, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas, this the 3rd. day of February, A. D., 1981.

/s/ THOMAS LOWE
Thomas Lowe, Clerk of the Court
of Criminal Appeals of Texas